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In The
Supreme Court of the United States

WILLIAM OVERTON, et al.,

Petitioners,

vs.

MICHELLE BAZZETTA, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION AND FOUR OTHER ORGANIZATIONS INTERESTED IN THE RIGHTS OF PRISONERS IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization of more than 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU of Michigan is one of its state affiliates. The ACLU established the National Prison Project to protect and promote the civil and constitutional rights of prisoners and the Women's Rights Project to protect and promote the civil and constitutional rights of women.

The Legal Aid Society of the City of New York is a private organization that provides free legal assistance to indigent persons in New York City. Though its Prisoners' Rights Project, the Society defends the constitutional rights of prisoners.

The American Friends Service Committee is a Quaker-based organization devoted to building a just and peaceful world. The Religious Society of Friends (Quakers) has been demanding just prison conditions for inmates for two centuries.

The Citizens Alliance on Prisons and Public Spending is a Michigan Coalition of civic, religious, and civil rights groups, criminal justice professionals, mental health and substance abuse treatment providers, educators, advocates for children and families, and others who are concerned about the social and economic costs of our greatly expanded prison system.

Citizens United for the Rehabilitation of Errants (CURE) is a nationwide grassroots criminal justice reform

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[1]No counsel for any party authored any part of this brief. No persons or entities other than the *amici curiae* made any monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, copies of letters of consent to the filing of this brief have been lodged with the Court.

organization whose membership primarily consists of prisoners, ex-prisoners and their family members. CURE believes that the isolation of prisoners and the destruction of their support systems discourage rehabilitation.

STATEMENT OF THE CASE

In 1995 the Michigan Department of Corrections promulgated a revised visitation rule that allows a permanent ban on all visitation, other than with a lawyer or member of the clergy, for a prisoner who has been found guilty of two violations of prison disciplinary rules relating to substance abuse. The new rule also prohibits visits to a prisoner by a minor unless the minor is the child, stepchild or grandchild of the prisoner and accompanied by a guardian or adult member of the prisoner's immediate family. For purposes of the rule, the term "immediate family" was defined to include aunts and uncles with previous close ties to the prisoner and grandparents. Minors are also not allowed to visit an incarcerated parent if parental rights have been terminated, regardless of the custodial parent's views as to the desirability of continued visitation. Additionally, the rule prohibits former prisoners from visiting unless they are members of the prisoner's immediate family. *See* Mich. Admin. Code R. 791.6607-791.6614 (2002).

The Respondents, prisoners and prospective prison visitors, filed a class action seeking injunctive relief against the restrictions. The trial court and the Sixth Circuit Court of Appeals upheld the rule as applied to contact visitation. The trial court then considered the Respondents' renewed constitutional challenges under the First, Eighth and Fourteenth Amendments and held that the restrictions on non-contact visits were unconstitutional. *Bazzetta v. McGinnis*, 148 F. Supp. 2d 813 (E.D. Mich. 2001). The Petitioners appealed to the Sixth Circuit, and that court affirmed. *Bazzetta v. McGinnis*, 286 F.3d 311 (6th Cir. 2002). This Court granted a writ of certiorari to determine whether the challenged rules can constitutionally be applied to non-

contact visits. The question of contact visits is not before the Court.

SUMMARY OF ARGUMENT

This Court has recognized that the right to association includes the right to create and maintain intimate relationships. This right is not lost upon incarceration, although it is subject to substantial restrictions, as demonstrated by this Court's decision in *Turner v. Safley*, 482 U.S. 78, 95, 99 (1987), striking down restrictions on the right of prisoners to marry. Probably the most important of prisoners' retained rights to maintain intimate relationships is the right to visit, and none of the Court's previous decisions supports a claim that this right is extinguished upon incarceration. Nor does the recognition of such a right imply that prison officials could not impose some short-term restrictions on the availability of visits, or other restrictions that have the incidental effect of making visits more difficult.

Historical evidence of prison practices in the United States and England as of the enactment of the Bill of Rights refutes any claim that a sentence to prison was assumed to end all right to visits with loved ones. In the nineteenth century, the Auburn and Pennsylvania prison systems substantially restricted prisoners' ability to maintain even minimal human contact with others, but those systems were abandoned precisely because they destroyed the mental health of prisoners rather than reforming them, as this Court recognized in *In re Medley*, 134 U.S. 160 (1890). Modern scholarship confirms the wisdom of history that society's interests, as well as those of prisoners and their families, are served by a recognition of prisoners' rights to association.

The various restrictions that Petitioners have imposed on non-contact visits for prisoners violate the four-part test adopted in *Turner*. The permanent ban on visits by prisoners based on two findings of prison misconduct involving substance abuse fails the *Turner* test because the punishment rests on a theory of general deterrence that would allow

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Court has made clear in *Roberts* and elsewhere that the right is "exemplif[ied by] those [relationships] that attend the creation and sustenance of a family," including marriage and the rearing of children. 468 U.S. at 619.

If incarceration destroyed prisoners' interest in maintaining intimate relationships, then prison officials presumably could also ban prisoners' letters and telephone calls to and from family members. This Court, however, has made clear that prisoners do not forfeit all rights of intimate association. Thus, even in prison, any restrictions on the right of a prisoner to associate with close family members must take into account the important constitutional interests at stake. The Court's seminal decision in *Turner* reflected that approach. It not only recognized the continued existence in prison of the right to marry but struck down a Missouri prison regulation that infringed on that retained right. 482 U.S. at 95, 99. In *Turner*, the Court relied on its earlier decision in *Zablocki v. Redhail*, 434 U.S. 374 (1978), for the proposition that there is a constitutionally protected right to marry. *Zablocki*, in turn, roots the right to marry in the protection the Due Process Clause gives to matters of choice in family life. *Id.* at 384-85.

Of course, the right to intimate association is necessarily subject to substantial restriction in prison, but the fact that incarceration may justify some limits on the right is far different from claiming, as Petitioners do, that the right *in toto* is inconsistent with the status of being a prisoner. *Compare Pell v. Procunier*, 417 U.S. 817, 823 (1974) (noting that allowing a prisoner to leave prison to visit family members would be inconsistent with the status of being a prisoner), *with Procunier v. Martinez*, 416 U.S. 396, 409 (1974) ("Accordingly, we reject any attempt to justify censorship of inmate correspondence merely by reference to certain assumptions about the legal status of prisoners."), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401, 413-414 (1989).

Society has compelling interests in assuring that prisoners maintain intimate personal ties even while incarcerated. Unrefuted evidence in the trial court established that prisoners who maintained quality, continuous contact with three people during their term of incarceration were one-sixth as likely as others to be back in prison one year after release. *Bazzetta*, 148 F. Supp. 2d at 851. Similarly, the recidivism rate for prisoners who live with a partner upon release is around fifteen to twenty percent, compared with a standard rate of 63 percent. *Id.* at 853. Unrefuted evidence also established that visitation with family and friends is the single most important factor in stabilizing a prisoner's mental health and supporting a prisoner's successful return to society. *Id.* at 851-52. That empirical evidence, moreover, is reinforced by historical practice.

B. The Historical Background

Contrary to the claims of the United States, *see* Brief for the United States ("U.S. Brief") at 14-16, the historical record does not support a refusal to recognize an interest of constitutional magnitude that survives incarceration. The Justice Department argues that early prisons in the United States often severely restricted or precluded visitation, but it relies almost exclusively on references to practices in state and local prisons in the early nineteenth century, practices that obviously could not have informed the contemporaneous understanding of drafters of the Fifth Amendment to the Constitution. *The Oxford History of the Prison*, cited in the U.S. Brief at 14, sharply distinguishes between such policies in 1780, when "[o]nly the presence of irons differentiated the felons from the visitors," and policies in 1865, when prisoners were allowed few visitors. *The Oxford History of the Prison* 79, 108 (Norval Morris & David J. Rothman eds., 1995).

Sentences to imprisonment were uncommon in eighteen century America, but colonial jails, like English jails, admitted visitors freely. David J. Rothman, *The Discovery of*

the Asylum 48 (1971); Leonard G. Leverson, *Constitutional Limits on the Power to Restrict Access to Prisons: an Historical Re-examination*, 18 Harv. C.R.-C.L. L. Rev. 409, 414 (1983); *see also The Oxford History of the Prison, supra*, at 80-83 . Indeed, a man imprisoned in a New York jail in 1770 for writing an anti-British pamphlet published a notice in the local paper announcing the hours during which he hoped to receive friends at the jail. *Leverson, supra*, at 414 n.23 (citing The Am. Scenic & Historic Pres. Soc'y, The Old Martyrs' Prison 9 (1902) (on file with the Harvard Law School Library)). In the early nineteenth century, a prospective visitor originally refused entry to Newgate State Prison, in what is now Greenwich Village in New York, threatened to sue for admission. The Board of Prison Inspectors "doubted the right of refusing him, and were unwilling to risk the event of an action at law." *Leverson, supra*, at 415 & n.27, (quoting Journal of the Assemb. of the State of N.Y., 45th Sess., at 106 (1825)).

Moreover, as this Court noted in *In re Medley*, 134 U.S. 160 (1890), under English law, solitary confinement, which had as its essential feature cutting off all communication with the prisoner, involved a distinct punishment imposed under a separate statute and was considered "additional punishment of such a severe kind that it is spoken of in the preamble [to the statute] as a further terror and peculiar mark of infamy to be added to the punishment of death." *Id.* at 170 (internal quotation omitted).

Nor does the experience of the nineteenth century prisons cited in the U.S. Brief support the argument that this Court need not recognize the serious interests of prisoners in maintaining intimate family relationships. The United States reports the historical practices of these prisons but not the historical consensus about their consequences. In the 1820's the Auburn state prison in New York first implemented a method of prison organization that involved prisoners working together in enforced silence, forbidden to speak or even look at other prisoners during the course of their

confinement. During the same period Pennsylvania developed a system in which prisoners were isolated during the entire period of imprisonment. Prisoners served their entire sentence locked in single cells, with communications limited to a few selected guards and visitors. Rothman, *supra*, at 79-82.

The comparative merits of the two systems were the subject of impassioned debate. For example, the supporters of the contending systems exchanged charges as to which was more likely to cause the prisoners to die or become mentally ill. *Id.* at 81, 87-88. In fact, however, the two systems were quite similar in their destructive effects. The 1845 Report of the Correctional Association of New York reported that, over the preceding two decades, the Auburn system had produced a death rate of 56 percent and the Pennsylvania system had a death rate of 71 percent. Ilan K. Reich, *A Citizen Crusade for Prison Reform* (1994), *available at* http://www.correctionhistory.org/html/chronicl/cany/html/cany01.html.

This Court, holding that a Colorado statute that imposed solitary confinement on prisoners awaiting execution imposed an *ex post facto* punishment as applied to a previously-sentenced prisoner, described the Pennsylvania system as follows:

> The peculiarities of this system were the complete isolation of the prisoner from all human society .... But experience demonstrated that there were serious objections to it. A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.

In Re Medley, 134 U.S. at 168.

We do not cite this historical evidence to argue that Michigan's policies are as destructive as the policies adopted in the Auburn and Pennsylvania systems. Rather it shows that these examples are not persuasive evidence that the historical record negates the existence of any constitutional interest on the part of prisoners in maintaining intimate relationships. *See* U.S. Brief at 14-16. It further shows that the wholesale disregard of human associational needs has quite predictable and devastating consequences.

C. The Right to Visit as an Aspect of the Right to Maintain Intimate Relationships

In the prison context, the right to visit is a necessary corollary of the right to maintain intimate relationships. As this Court noted in *Thornburgh v. Abbott*, 490 U.S. 401 (1989), access to prisoners is essential for families who seek to sustain personal relationships with their loved ones. *Id.* at 407; *see also Pell*, 417 U.S. at 823-24 (noting that the "'existence of other alternatives does not extinguish altogether any constitutional interest on the part of the appellees in this particular form of [face-to-face] access'") (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972) (internal brackets omitted)).

The U.S. Brief argues that the Court need not recognize a constitutional right to visits because a complete denial of visits, contact and non-contact, is not quite the same as a complete severing of all of a prisoner's means of communicating with loved ones, in light of alternative means of sustaining such relationships through correspondence and access to the telephone. U.S. Brief at 12. The *Turner* Court rejected this analysis, holding that the availability of alternative means of exercising a right is only one of several factors to be weighed in assessing claims of infringement on constitutional rights. 482 U.S. at 90. In contrast, the approach of the U.S. Brief would find that no constitutional right exists as long as some alternative remains available, thus short-circuiting the *Turner* analysis. Constitutional

protection for face-to-face visits with loved ones involves a core aspect of the right to maintain intimate relationships, an aspect that for prisoners is probably the most important feature of their retained rights to maintain intimate associations.[2]

Recognition of this right is consistent with all of this Court's previous decisions. In a number of cases, the Court has analyzed restrictions on prisoners' retained right to face-to-face visitation, and this analysis would have been unnecessary in the absence of a predicate constitutional right implicated by the restrictions. *See Pell*, 417 U.S. at 823-24; *see also Block v. Rutherford*, 468 U.S. 576, 586 n.8 (1984) (quoting *Bell v. Wolfish*, 441 U.S. 520, 546 (1979), for the proposition that maintaining jail security, internal order and discipline are essential goals that at times require restrictions on the retained constitutional rights of prisoners and holding that the jail's policy of denying contact visits to detainees did not violate the Fourteenth Amendment); *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 465 (1989) (Kennedy, J., concurring) ("Nothing in the Court's opinion forecloses the claim that a prison regulation permanently forbidding all visits to some or all prisoners implicates the protections of the Due Process Clause in a way that the precise and individualized restrictions here [regarding exclusion for short periods of individual visitors who were suspected of visit-related misconduct] do not.").

We do not argue that all short-term restrictions on visitation, whether as incidental punishment or otherwise, implicate retained constitutional rights. Shorter restrictions

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[2]To the extent that the issue of visitation of family members arises in a non-institutional context, ordinarily the question is the extent to which the state might limit the right of a custodial parent or guardian to restrict visitation with others. *See, e.g.*, U.S. Brief at 18. Since all the disputes about visits by minors in the instant case, however, necessarily involve custodial parents who desire that the child have visits with the prisoner, these cases are of little relevance here.

may not have the same effects of destroying the intimate relationships that are a prisoner's lifeline, and therefore do not always implicate an interest of constitutional magnitude. Moreover, this case does not give the Court an occasion to review restrictions on contact visits for prisoners; such visits have obvious security implications that are ordinarily irrelevant to non-contact visitation.[3]

Rather, we urge the Court to find that restrictions like those at issue here, which destroy the possibility of face-to-face visitation with the prisoner's loved ones, either permanently or until a child reaches maturity, implicate a right of constitutional dimensions that can be abrogated only if the restrictions meet the standards set forth in *Turner*. As the Court noted in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), "[a]ppropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful respect for the teachings of history, and solid recognition of the basic values that underlie our society." *Id.* at 503 (internal quotation marks, brackets, citations and footnote omitted). Among those basic values are the right to establish and maintain intimate relationships. The record in this case confirms the importance of recognizing these basic values. As stated in the trial court's findings of fact, "[a] broad consensus, supported by decades of research, affirms that

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[3] The United States points out that the federal prison system contains a few prisoners and detainees suspected of terrorism. *See* U.S. Brief at 21. This concern, however, applies to a handful of prisoners in comparison to the over two million persons behind bars, and the Petitioners have made no claims that any of their regulations here are necessary on this basis. Accordingly, this case gives the Court no occasion to consider whether there are any circumstances in which non-contact and closely monitored visits may be denied to a prisoner based on an assessment of a risk related to communications with the visitors. Because distinctions are possible among prisoners who pose different levels of security concerns, the Court should not establish the constitutional baseline for all prisoners based on concerns that apply to a minuscule number of cases.

visits promote rehabilitation, reduce behavior problems, and significantly increase a prisoner's chance for success on parole." 148 F. Supp. 2d at 818. When contemporary scholarship confirms the wisdom of history, that wisdom should not be lightly disregarded.

II. THE CHALLENGED RESTRICTIONS FAIL THE *TURNER* TEST

A. The Permanent Ban on Visitation for Two Substance Abuse Disciplinary Reports

Although the Petitioners refer to a "two-year visitation restriction," Pet. Br. at 37, the regulation itself refers to the visitation ban as "permanent." Mich. Admin. Code R. 791.6609 (11) & (12) (2002).

Approximately 1250 prisoners in Michigan have thus been punished by permanent loss of all visitation, based on two administrative findings of misconduct in violation of the substance abuse prison discipline rule. *Bazetta*, 148 F. Supp. 2d at 818 n.1 (noting that twenty percent of the prisoners punished under the regulation equaled approximately 250 files). Petitioners assert that their legitimate penological interest, a prerequisite to the application of the four-pronged *Turner* test, is deterrence of the use of illegal drugs. Under the particular facts of this case, however, the appropriate characterization is the interest of prison officials in deterring misconduct unrelated to the assertion of the constitutional right that they wish to infringe.

Michigan here asserts a breathtaking power to deter misconduct by intentionally depriving prisoners of a constitutional right as punishment for conduct that is unrelated to the exercise of that right. If this application of *Turner* were to be upheld, a prison official could punish any prison misconduct by invading any of a prisoner's remaining

constitutional rights, save the Eighth Amendment.[4] In this case Petitioners exempt clergy and lawyer visits from their permanent ban on visits, but the justification they offer applies equally well to barring religious or legal visits, and barring such visits solely to punish prisoners would increase the presumed deterrent effect of the rule by making the penalty even more onerous.

Moreover, the principle for which Petitioners argue, if accepted, would seem to apply beyond the context of prisoner misconduct punishments. A prison official could argue that making prison as unpleasant as possible would have a deterrent effect, so all prisoners should have their constitutional rights eliminated, to the greatest extent that the courts will allow, in order to discourage the commission of crime. Accordingly, prison officials might seek to deny all prisoners all family, clergy and lawyer visits, contact or non-contact, or all reading material, regardless of offense, length of sentence, or security concerns.

Every conceivable intrusion into prisoners' constitutional rights could be justified by the single penological interest of deterring crime, with the result that the requirement that prison officials articulate a legitimate penological interest justifying the restrictions would, for all practical purposes, disappear. To prevent this result, the Court should decline to recognize simple deterrence as a legitimate penological purpose justifying intrusions into constitutional rights that are unrelated to the conduct sought to be deterred.

Such a principle would preserve the prerogatives of prison officials with respect to the needs of prison administration. For example, it would not affect the ability of

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[4]This Court has never applied the *Turner* analysis in the context of determining whether a violation of the Eighth Amendment existed. *See, e.g., Farmer v. Brennan*, 511 U.S. 825 (1994) (applying Eighth Amendment "deliberate indifference" standard).

prison administrators to assert that restricting visits as a sanction for violation of the visitation rules is necessary specifically to deter such violations, nor would it affect the ability of administrators to punish prisoners in ways that have the incidental effect of intruding on constitutional rights, such as a rule restricting visitation rights applicable to prisoners confined to disciplinary segregation. *Cf. Olim v. Wakinekona*, 461 U.S. 238, 248-49 & n. 9 (1983) (prisoner had no liberty interest in avoiding transfer to mainland prison from Hawaii despite incidental effect of transfer on separation from family). Short-term restrictions on general visitation would not necessarily implicate the right to maintain intimate relationships. *Cf. Sandin v. Conner*, 515 U.S. 472, 486 (1995) (holding that thirty days of disciplinary confinement, under the particular facts of the case, did not implicate a liberty interest).

Even if the Court were to consider the Petitioners' assertion of a global deterrence interest as sufficient to establish a legitimate penological interest, the regulation would nonetheless fail the first prong of *Turner*. The first *Turner* factor requires that there be a "valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it." 482 U.S. at 89 (internal quotation omitted). The only interest asserted in the trial court by Petitioners was the interest in deterring the use of illegal drugs. Significantly, prison officials testified that the ban on visitation was not tied to concerns about possible smuggling during the visitation process; rather, "visits were chosen as the vehicle of punishment because they are very important to prisoners—and loss of visits would be a significant deprivation." *Bazzetta*, 148 F. Supp. 2d at 836.

The lack of fit between the regulation and its goal is also underlined by the fact that Petitioners justified the regulation as related to substance abuse because of a view that substance abuse leads to violence. *Id.* Notwithstanding that fact, the permanent visitation ban does not apply to

prisoners who engage in violence. Mich. Admin. Code R. 791.6609 (11). Accordingly, the relationship between the goals asserted by Petitioners and the regulation is attenuated not only because the goal is formulated in a way that would allow Petitioners to invade any constitutional right they chose, but because the regulation is wildly underinclusive in targeting the behavior that Petitioners claimed was their reason for punishing drug use so severely. It is as if marijuana use were punished on the ground that such use acted as a gateway to the use of heroin, but heroin use itself was not similarly punished.

In addition, for the same reasons given above, denying visits on grounds unrelated to violations of the visiting rules lacks a valid, rational connection to the purpose of deterring drug use. Again, any analysis that would allow permanent deprivation of visits with loved ones would also allow deprivation of visits with clergy and lawyers, or of any other rights. The Petitioners offered no data demonstrating any connection between the regulation and the asserted interest. 148 F. Supp. 2d at 843. Indeed, the former director of the Michigan Department of Corrections who was responsible for the policy, *id.* at 836, testified that he did not know if substance abuse misconducts went up or down after the regulation was introduced. *Id.* at 843 n.48.

While this failure to offer evidence would not by itself be fatal to the Petitioners' case, the record affirmatively disproves any rational connection between the regulation and the goal. Even if courts initially defer to the "common sense" assertions of prison officials, that deference should not control when the plaintiffs present substantial evidence to the contrary. *See Turner*, 482 U.S. at 86 (courts should ordinarily defer to the views of prison administrators "in the absence of substantial evidence in the record that the officials have exaggerated their response") (quoting *Pell v. Procunier*, 417 U.S. at 827).

The Respondents presented substantial evidence

refuting the Petitioners' claims. As the trial court found, visits promote rehabilitation, reduce behavior problems, and help maintain mental health. 148 F. Supp. 2d at 818. The function of visits in promoting mental health is particularly important for prisoners who suffer from substance abuse. *Id.* The trial court cited evidence of a consensus that maintenance of a substance abuser's support group is a crucial part of treatment, so that the permanent ban on visitation by loved ones is extremely counter-therapeutic and would actually increase the abuser's drug problem. *Id.* at 854. Accordingly, the trial court found that "substantial evidence was presented to establish that the permanent ban is counterproductive to the prisoners' mental health, stability, potential for future substance abuse, and rehabilitation." *Id.* at 855.

A further example of the lack of fit between the regulation and its stated goals is that the regulation punishes the innocent family members and not just the guilty prisoner. Indeed, those most harmed by the regulation are overwhelmingly likely to be the young children who are prevented by the regulation from establishing a stable parental bond.

The regulation also fails the second *Turner* prong, focusing on whether there are other available means of exercising the right. 482 U.S. at 90. Contrary to Petitioners' assertion, there is substantial evidence that the avenues remaining to prisoners who have permanently lost the right to visitation with their loved ones do not constitute meaningful alternatives for the exercise of the right. As the trial court found, letters and telephone calls are not an adequate alternative means of maintaining intimate ties with loved ones. 148 F. Supp. 2d at 849.[5] Some forty percent of

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[5]A message comes over the telephone every few minutes announcing that the call is being monitored, disrupting the flow of communication and the emotional connection that might otherwise be possible. *Bazzetta*, 148 F. Supp. 2d at 818 n.2.

prisoners are illiterate, *id.* at 818 n.2, and children below a certain age cannot use writing as a means of communication. Moreover, the experience of being in the presence of a loved one, the ability to see that person while speaking and observe the changing facial expression and body language that accompany intimate speech, are too qualitatively different from either letters or the occasional availability of a telephone call to serve as a realistic alternative. It scarcely needs demonstration that the parental bond of a young child who grows from infant to toddler to schoolchild will be forever blighted if the parent figures only as the disembodied voice on the other end of the telephone or the unseen stranger whose letters are read to the child by others. While the Petitioner's policy is said to aim at reducing drug use, a laudable goal, those foreseeably most severely punished will include the young and the innocent.

The third *Turner* prong assesses the impact that accommodation of the right will have on guards and other inmates. 482 U.S. at 90. Absent the challenged rule, the Petitioners would retain highly punitive measure to deter the use of drugs in prison, including referrals for criminal prosecution, the loss of good time, assignment to disciplinary segregation, and denial of parole. Moreover, the trial court found that there would be no significant impact on prison resources from accommodating the constitutional right to non-contact visits because the internal prison industries program constructs portable non-contact visiting booths, all facilities have these booths available, and a warden who needed more of the booths could get them. 148 F. Supp. 2d at 831. In any event, "[f]inancial constraints may not be used to justify the creation or perpetuation of constitutional violations." *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 392 (1992).

The U.S. Brief implies that upholding the lower court decisions would somehow have a negative impact on Bureau of Prisons resources by requiring it to build facilities for non-

contact visitation in prisons that lack such facilities. *See* U.S. Brief at 3. The Bureau's visiting policies are simply not comparable to the challenged regulations, and the prisoners' claims here should not be rejected because in other circumstances a *Turner* analysis might or might not show the restrictions to be justified.

Moreover, this third prong should also account for the interests of non-prisoners as well as prisoners when, as in this case, the rights of the two groups are "inextricably meshed." *Procunier*, 416 U.S. at 409 (referring to prisoner correspondence with non-prisoners). While this Court in *Thornburgh v. Abbott*, 490 U.S. at 413-14, declined to apply a different legal standard for cases that involved the constitutional rights of non-prisoners as well as prisoners, it did acknowledge that non-prisoners have a "legitimate [constitutional] interest in access to prisoners." *Id.* at 408. That legitimate interest is meaningless unless the Court weighs the effects on prisoners' loved ones of the policies challenged here, as well as the effects on guards and other prisoners, in determining whether the policies trench too deeply on constitutional rights.

The final prong of the *Turner* test involves the availability of ready alternatives, which may demonstrate whether the challenged policy is an "exaggerated response." 482 U.S. at 90. In this case, the answer is surely yes. As noted above, prison officials have numerous and severe sanctions at their disposal to punish and deter substance abuse without the need to target a prisoner's ability to maintain intimate family relationships. Furthermore, in light of the trial court's findings that the regulation actually undermined the asserted goal of reducing substance abuse, 148 F. Supp. 2d at 845, and that the regulation was more punitive than the visiting restrictions of any other State, *see id.* at 835, the regulation constitutes an "exaggerated response" to the Petitioners' penological concerns.

B. The Restrictions on Visits from Minors Not Accompanied by a Member of the Immediate Family

The Petitioners require that a minor son or daughter of the prisoner be accompanied by a member of the prisoner's immediate family; previous practice had allowed the child to be accompanied by any responsible adult, designated by power of attorney. *Bazzetta*, 148 F. Supp. 2d at 833. This restriction means, for example, that if the prisoner and the father of her minor son or daughter are not married to each other, or are divorced, the child's father cannot bring the child for a visit. The unrefuted evidence demonstrated that many prisoners, particularly women, do not have another immediate family member available to bring their children to visit. *Id.* Under these circumstances, mother and child may not see each other's face, or converse with each other in person, from the child's infancy until the child reaches adulthood.

This rule, like the permanent ban on visits, fails the first prong of the *Turner* test because there is no "valid, rational connection" between the interests Petitioners assert and the lines drawn by the rule. *See* 482 U.S. at 89. The Petitioners stated at trial that this aspect of the rule was motivated by a desire to decrease the total number of visitors, and minor visitors in particular, in order to reduce the introduction of contraband into the facilities, and avoid possible harm to children. 148 F. Supp. 2d at 822-24.

To the extent that the Petitioners argue that problems applicable only to visits by minors justify the restrictions, substantial evidence in the record refutes the claimed connection. First, the issue here solely concerns non-contact visits, and the record affirmatively shows that there are no records of any smuggling or attempted smuggling in a non-contact visit since January 1, 1994. *Id.* at 822. In light of that fact, and indeed the lack of any plausible scenario that would support such a claim, there is neither evidence nor a claim by

Petitioners[6] that children would be a more likely source of contraband introduction in non-contact visits than unrelated adult visitors. Notwithstanding that fact, the Petitioners' rules permit unrelated adult visitors, and in many circumstances these visitors may engage in contact visits under the rules. *See* Mich. Admin. Code R. 791.6609(2); *see also* Mich. Dep't of Corr. Policy Directive 05.03.140, at 6 (Jan. 12, 1998) (defining the circumstances in which only non-contact visits are permitted).

Petitioners speculate that children might be placed at risk of injury, particularly exposure to sexual conduct, if they were allowed non-contact visitation. A survey of all the Michigan prisons near the time of trial in 2000 found no records for the past sixteen years reflecting incidents of sexual misconduct during non-contact visits that involved minors, or that involved sexual misconduct that a minor could see. *Bazzetta*, 148 F. Supp. 2d at 829. In fact, because of the construction of the non-contact visiting booths, the only way a small child could see sexual misconduct by the prisoner during a non-contact visit would be to stand on the visitor's lap, sit on the visitor's shoulders, or be similarly propped up.[7] Moreover, the Petitioners allow other children to participate in contact visits with prisoners eligible for such visits, where

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[6]*See Bazzetta*, 148 F. Supp. 2d at 830 & n.14. The Justice Department's assertion at page 27 of its Brief that non-contact visits of children would still pose a risk of physical assault or smuggling has no predicate in the record of this case or in any plausible scenario. Given the statement that the Bureau of Prisons primarily relies on contact visitation, *see* U.S. Brief at 3, the unsupported claims that various problems have occurred in connection with visits in the Bureau, *see id.* at 26, do not allow any inference about the dangers of non-contact visitation.

[7]*See* J.A. of *Bazzetta v. McGinnis*, 286 F.3d 311 (6th Cir. 2002), at 5431-5432 (testimony of Pamela Withrow). Ms. Withrow has been a warden at various Michigan Department of Corrections facilities since 1983. *Bazzetta*, 148 F. Supp. 2d at 817.

there is obviously a far greater theoretical possibility of the child witnessing sexual conduct.

To the extent that the Petitioners testified that the rule was undertaken to reduce the overall number of visitors, the fit between the rule and the rationale is tenuous at best, because the stated rationale applies equally to all visitors, including unrelated adult visitors. The restriction was also unnecessary because the Petitioners' goal was to reduce total visitation by ten to fifteen percent, yet the regulations they enacted had the effect of halving visitation. *See Bazzetta*, 148 F. Supp. 2d at 820-21. Much of this reduction took place because of other changes in the visiting regulations, changes that have not been challenged by the prisoners. These changes included restrictions on the number of visits allowed to a prisoner each month, depending on the security classification; restrictions on the hours of visitation; limits on the number of visitors allowed a particular prisoner; and limits on the number of weekend visits. It thus follows that Petitioners' concerns about the volume of visitors could be addressed more directly without trenching on the critical family interests here at stake, by these and similar measures.

Another interest the Petitioners asserted for not allowing visits based on a power of attorney from the parent is the possibility that such documents could be forged. Again, there is little fit between the asserted interest and the rule. Under Petitioners' rules, the adult accompanying the child must go through the standard screening that Michigan requires of all visitors. *Bazzetta*, 148 F. Supp. 2d at 833, 849. Accordingly, the adult visitor would have to be someone otherwise allowed to visit the prisoner, and in many cases someone who would be allowed a contact visit with the prisoner.

Powers of attorney are notarized documents, and there was not a single instance in which a power of attorney had been forged. *Id.* at 833. Since the Petitioners already insist upon a variety of documents, including documents that

are not notarized, to establish identity and family relationships of prospective visitors, *see* Mich. Admin. Code R. 791.6609(2)(b),(c), their stated concern about forgery is an exaggerated response when they do not claim this concern in any other visitation context. Moreover, the only alternative for visitation in these circumstances is for the custodial parent to appoint a guardian, which poses many obvious risks to her future relationship with the child. *Bazzetta* 148 F. Supp. 2d at 833. Because the Petitioners' rule has such an attenuated relationship to any of the Petitioners' asserted justifications for it, it fails the first prong of the *Turner* test.

This rule also fails the second prong because, for the reasons given above in Section II. A, the alternative means of maintaining relationships with family members that remain open to prisoners—telephone calls and letters—are inadequate. The third *Turner* prong involves the effects on guards and other prisoners. Again, for essentially the same reasons as given above in Section II.A, the addition of a comparatively small number of prisoners' children should have no effect on guards in light of the options that the prisons retain to control the total amount of visitation, and the fact that other restrictions on visitation have already reduced it beyond the Petitioners' goal. As to the effect on other prisoners, while it is possible that Petitioners could decide to offset increases in family visitation by further reductions in non-family visitation, the interest of other prisoners in maintaining current levels of non-family visitation pales in comparison to the paramount interest of parents in maintaining relationships with their minor children.

Finally, the rule is a classic "exaggerated response." As noted above, the restrictions on visitation, most of which are not challenged by Respondents, were primarily designed to reduce the numbers of total visitors, and they succeeded far beyond the officials' expectations in doing so. None of the interests asserted by Petitioners have anything to do with the particular characteristics of these children, and Petitioners'

actions in barring them from non-contact visits is exaggerated when these same concerns do not result in barring other children from participating in contact visits, where concerns about the introduction of contraband or exposure of children to possible sexual misconduct have a more plausible factual basis. The Petitioners' further expressed concern—that responsible adults who have a power of attorney from the custodial parent to accompany the child will not be as attentive to the child as a member of the immediate family would be— is also exaggerated in light of the fact that the record affirmatively shows that non-contact visits have never harmed a child. *See Bazzetta*, 148 F. Supp. 2d at 829.

Most significantly, the stated concern is exaggerated because the theoretical harm Petitioners posit pales in comparison to the obvious and known harm that the rule causes by its destructive effects on the bond between parent and son or daughter in the critical period of childhood. Good parents make judgments all the time that, for example, the known statistical risks of transportation by plane or automobile are outweighed by the benefits of the journey for the child. Particularly because Michigan prison officials obviously do not think that either contact or non-contact visits are so dangerous that all children must be barred from entry, there is no justification for sacrificing the bond between parent and child based on unsupported speculation of a purely theoretical risk from such visits.

C. Other Restrictions Barring Visits by Children and the Restriction on Visits by Former Prisoners

For similar reasons, the Petitioners' other restrictions on visitors cannot withstand a *Turner* analysis. First, the provision of the rule, Mich. Admin. Code R. 791.6609(2)(b), that bars visits from minor nieces and nephews relies on an inappropriately narrow definition of "immediate family." *See Moore v. City of East Cleveland*, 431 U.S. 494, 504 (1977) (plurality opinion) (noting that the constitutional concern for

the institution of the family is not limited to the nuclear family in the context of striking down a zoning ordinance that prevented a grandmother from living with her grandchildren). None of the reasons asserted by Petitioners in support of their rule has anything to do with the particular characteristics of nieces and nephews, and their concerns are exaggerated, particularly when these same concerns do not result in barring other children from participating in both contact and non-contact visits.

This is particularly so because the record suggests that many of Petitioners' asserted rationales for this restriction are little more than post-hoc rationalizations. The lack of close attention given the rule when it was promulgated is illustrated by the fact that siblings of prisoners were excluded essentially because of an oversight. *See Bazzetta*, 148 F. Supp. 2d at 823, 829. If minor siblings were simply forgotten about, it is hard to believe that much attention was focused on nieces and nephews.

For similar reasons, the ban on visits by the son or daughter of a prisoner whose parental rights have been terminated, even if the guardian or custodial parent believes that the visits are in the child's interests, should be stricken. None of the state's asserted interests here has a valid, rational relationship to overriding the decision of the guardian or custodial parent.

Finally, the ban on former prisoners is an "exaggerated response" because it operates as a lifetime bar, without regard to demonstrated rehabilitation, the length of time since the offense, or the nature of the offense. Here the "obvious, easy" alternative is similar to the individualized screening alternative the Court noted approvingly in *Turner*, 482 U.S. at 98. In this case, Petitioners could establish general criteria allowing visits by some former prisoners, such as those whose only conviction was for a minor offense, or those who had been out of prison for a set period of time, with subsequent individual screening through the Petitioners'

standard screening procedure to remove former prisoners who, despite the remoteness or lack of seriousness of previous convictions, are nonetheless deemed a possible security threat.

III. PETITIONERS' PERMANENT BAN ON FAMILY VISITS VIOLATES THE EIGHTH AMENDMENT

A. The Eighth Amendment's Protection is not Limited to Deprivation of Physical Needs

The Eighth Amendment prohibits "the unnecessary and wanton infliction of pain." *Whitley v. Albers*, 475 U.S. 312, 319 (1986) (quotation omitted). The United States suggests that only conditions that deprive prisoners of basic physical needs can constitute cruel and unusual punishment. U.S. Brief at 29. But there is simply no basis in this Court's jurisprudence for distinguishing between physical and psychological pain for Eighth Amendment purposes. *Cf. Chambers v. Florida*, 309 U.S. 227, 237-38 (1940) (referring to solitary confinement as one of the techniques of "physical and mental torture" that have been used by governments to coerce confessions from their citizens).

Nearly half a century ago, this Court held that use of denationalization as punishment is barred by the Eighth Amendment. "There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society." *Trop v. Dulles*, 356 U.S.86, 101 (1958) (plurality opinion). Similarly, in the prison context, this Court's precedents make clear that the Eighth Amendment's protection is not limited to conditions of confinement that cause physical pain or cause a risk of physical harm. In *Hudson v. Palmer*, 468 U.S. 517 (1984), the Court held that the Fourth Amendment does not protect prisoners against searches of their cells, but suggested that cell searches amounting to "calculated harassment unrelated to prison needs" may violate the Eighth Amendment. *Id.* at 530.

Eight years later, in *Hudson v. McMillian*, 503 U.S. 1 (1992), the Court emphatically rejected the contention that the Eighth Amendment protects prisoners against excessive force only if the prisoner suffers "significant injury." *Id.* at 9-10. Noting "the concepts of dignity, civilized standards, humanity, and decency that animate the Eighth Amendment," *id.* at 11 (internal quotation omitted), the Court observed that the objective component of an Eighth Amendment claim is contextual and responsive to contemporary standards of decency. *Id.* at 8. Justice Blackmun added:

> It is not hard to imagine inflictions of psychological harm – without corresponding physical harm – that might prove to be cruel and unusual punishment . . . I am unaware of any precedent of this Court to the effect that psychological pain is not cognizable for constitutional purposes.

Id. at 16 (Blackmun, J., concurring in the judgment).

Most recently, in *Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508 (2002), this Court affirmed the Eleventh Circuit's holding that punishing a prisoner by cuffing him to a "hitching post" is a *per se* violation of the Eighth Amendment. 122 S. Ct. at 2519. The Court noted that while lack of proper clothing, water, or bathroom breaks would exacerbate the violation, they were not necessary to the finding of a violation. *Id.* Rather, the Court emphasized that "[t]he use of the hitching post under these circumstances violated the basic concept underlying the Eighth Amendment, which is nothing less than the dignity of man." *Id.* at 2514-15 (internal quotation, citation, brackets omitted). In short, this Court's precedents make clear that the deliberate infliction of psychological pain can rise to the level of an Eighth Amendment violation.

B. Petitioners' Permanent Visiting Ban Results in Unnecessary and Wanton Infliction of Pain

As noted above, Petitioners impose a permanent

visitation ban on prisoners who are found guilty of two major misconduct charges for "substance abuse." Mich. Admin. Code R. 791.6609(11)(d). There is no requirement of temporal proximity; a prisoner who received one such charge twenty years ago, but has had a clean disciplinary record ever since, is still subject to the permanent visitation ban upon receiving a second charge. It is undisputed that prisoners have been found guilty of "substance abuse" for having expired prescriptions and for possessing over-the-counter medications. *Bazzetta*, 148 F. Supp. 2d at 820 n.6. Nor is this draconian punishment sparingly applied; the trial court noted that over a thousand prisoners had been placed on permanent visitation ban. *Id.* at 818 n.1.

The district court noted the "overwhelming impact of the permanent visitation restriction on prisoners suffering from or prone to mental illness." 148 F. Supp. 2d at 853; *see also id.* at 838 n.39 (noting cases in which permanent visitation ban has been imposed on mentally ill prisoners); *id.* at 853-54 (quoting expert testimony that when mentally ill prisoners are subject to the permanent ban "they're more likely than anyone else to have a mental breakdown of the kind they have a propensity for").

Moreover, this Court has recognized the parent-child bond as "the most fundamental family relationship." *M.L.B. v. S.L.J.*, 519 U.S. 102, 121 (1996). A parent's "desire for and right to the companionship, care, custody, and management of his or her children is an interest far more precious than any property right." *Santosky v. Kramer*, 455 U.S. 745, 758-59 (1982) (internal quotation, citations omitted); *see also id.* at 787 (Rehnquist, J., dissenting) ("Few consequences of judicial action are so grave as the severance of natural family ties."). While constitutional protection is at its zenith when the parent-child relationship is implicated, relationships with other family members are also protected. *See e.g., Moore v. City of East Cleveland*, 431 U.S. at 504.

A government decree that one shall *never again* see

one's children, family, or friends results in "the unnecessary and wanton infliction of pain" in violation of the Eighth Amendment. For many prisoners, the permanent visitation ban means that for decades or the rest of their lives they will never again see their parents, children, brothers, sisters, or any other family member or loved one.

Although other states *temporarily* limit prisoners' visitation as punishment for various infractions, Petitioners and their state amici point to no other state that imposes a permanent loss of all visitation. *See* State Br. at 4-9. The fact that Michigan stands alone is compelling evidence that a permanent ban on visitation is both cruel and unusual in violation of the Eighth Amendment. *See Coker v. Georgia*, 433 U.S. 584, 595-96 (1977) (noting that the fact that Georgia was the only state authorizing death penalty for rape of an adult woman "weighs very heavily" against the constitutionality of that penalty).

The regulation at issue here completely deprives a prisoner of the society of her children and other family members for years, and possibly for the rest of her life. It is hard to conceive of a more severe punishment the state could inflict upon a person. If denationalization entails "the total destruction of the individual's status in organized society," *Trop*, 356 U.S. at 101, a decree that one shall never again see one's family and friends goes further still; it entails the total destruction of the individual's very personhood.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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